

**THIS OPINION IS NOT  
CITABLE  
AS PRECEDENT OF  
THE T.T.A.B.**

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513**

Baxley

Mailed: May 14, 2003

Opposition No. 91/151,964

RLH INDUSTRIES, INC.

v.

TRANS CONTINENTAL EQUIPMENT  
LTD.

Before Simms, Seeherman and Chapman,  
Administrative Trademark Judges.

By the Board:

Trans Continental Equipment Ltd. ("applicant") seeks to register the mark CHIMNEYFLEXIBLE LINERS and design in the following form



for "ducts, hoses, tubing, pipes, collars and coils for heating, ventilation, and air conditioning, all entirely or predominantly of metal processes; parts for the foregoing" in International Class 6."<sup>1</sup>

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<sup>1</sup> Application Serial No. 75/723,671, filed June 4, 1999, based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. 1051(a), and claiming a right of priority under Trademark Act

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RLH Industries, Inc. ("opposer") filed an opposition to the registration of applicant's mark on the ground that the involved mark so resembles opposer's previously used and registered mark CHIM-FLEX in typed form for "metal building materials; namely, metal chimney liners,"<sup>2</sup> as to be likely to cause confusion, mistake or to deceive the public under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d).

Applicant, in its answer, denied the salient allegations of the notice of opposition.

This case now comes up for consideration of opposer's motion (filed January 10, 2003) for summary judgment on the ground that there is a likelihood of confusion between the parties' respective marks.<sup>3</sup>

After reviewing the arguments and supporting papers of the parties, we find that opposer has not met its burden of establishing that no genuine issue of material fact exists as to its claim of likelihood of confusion. At a minimum,

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Section 44(d), 15 U.S.C. Section 1126(d), of April 27, 1999. The application alleges August 1998 as the date of first use and January 1999 as the date of first use in commerce and includes a disclaimer of "CHIMNEY FLEXIBLE LINERS" apart from the mark as shown.

<sup>2</sup> Registration No. 1,730,636, issued November 10, 1992, Section 8 affidavit accepted, Section 15 affidavit acknowledged, and reciting December 31, 1988 as the date of first use and date of first use in commerce.

<sup>3</sup> Although opposer has referred repeatedly to applicant's CHIMNEYFLEX mark in addition to the involved mark, the CHIMNEYFLEX mark is not involved in this proceeding and, as such, has not been considered in reaching our decision.

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genuine issues of material fact exist as to the similarity or dissimilarity of the marks at issue, including their overall commercial impressions; and, in view of the specialized nature of the goods at issue, the level of sophistication of purchasers of those goods and the care with which the goods would be purchased.<sup>4</sup>

In view thereof, opposer's motion for summary judgment is hereby denied.<sup>5</sup>

Proceedings herein are resumed, and trial dates are reset as follows.

DISCOVERY PERIOD TO CLOSE: **CLOSED**

Plaintiff's 30-day testimony period to close: **7/15/03**

Defendant's 30-day testimony period to close: **9/15/03**

15-day rebuttal testimony period to close: **10/30/03**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

<sup>4</sup> The fact that we have identified only a few genuine issues of material fact as sufficient bases for denying the motion for summary judgment should not be construed as a finding that these are necessarily the only issues which remain for trial.

5 The parties should note that the evidence submitted in support  
of and in opposition a motion for summary judgment is of record  
only for consideration of the motion. To be considered at final  
hearing, any such exhibits must be properly introduced in  
evidence during the appropriate trial period. See *Levi Strauss &  
Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993);  
*Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB (1983); *American Meat  
Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).

The parties should also note that applicant's concessions that opposer owns pleaded Registration No. 1,730,636, and that the goods at issue are similar were "for purposes of this motion" only. These matters are not otherwise conceded by applicant.

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on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.